American Bar Association
www.supremecourtpreview.org

No. 10-708

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
Successor in Interest to the First American Corporation,
and First American Title Insurance Company,

Petitioners,

v.

DENISE P. EDWARDS, Individually
and on Behalf of All Others Similarly Situated,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF THE NATIONAL ASSOCIATION
OF INDEPENDENT LAND TITLE AGENTS
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

GREGORY W. HAPP
Counsel of Record
238 West Liberty Street
Medina, Ohio 44256
(330) 723-7000
gregoryhapp@msn.com

*Counsel for Amicus Curiae
National Association of
Independent Title Agents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

STATEMENT 5

I. THE TITLE INSURANCE PROCESS 5

A. Real Property Title Assurance Prior to Title Insurance 7

B. Emergence of Title Insurance 8

C. Modern Title Insurance Practices......... 11

D. Marketing of Title Insurance Through Reverse Competition 18

E. The Formation of Affiliated Business Arrangements and Controlled Business Arrangements to Market Title Insurance 19

F. Buying of Market Share by Title Insurance Companies/Underwriters 20

II. VARIATION IN TITLE INSURANCE COMPANIES/UNDERWRITERS............... 22

A. Differences in Performance of Basic Services 23

B. Differences in Claim Handling 25

C. Differences in Financial Stability......... 26

D. Differences in Defalcation Prevention.... 28

TABLE OF CONTENTS – Continued

Page

ARGUMENT 29

I. REVERSE COMPETITION HARMS CONSUMERS AND INDEPENDENT TITLE AGENTS 30

II. CONGRESS RECOGNIZED THE IMPORTANCE OF A CONSUMER'S LEGAL RIGHT TO SELECTION OF SETTLEMENT SERVICE PROVIDERS 32

III. THE INJURIES DUE TO SUBSTANDARD TITLE INSURANCE SETTLEMENT SERVICES ARE LATENT AND HARD TO DETECT 34

IV. OHIO DOES NOT FIX OR ESTABLISH TITLE INSURANCE RATES 36

V. GOVERNMENTAL ENFORCEMENT EFFORTS CANNOT TAKE THE PLACE OF CONSUMERS ENFORCING THEIR OWN RIGHTS UNDER RESPA 38

A. State RESPA Enforcement Lacks Deterrence 39

B. Federal Enforcement is Difficult, Prohibitively Complex, and of Secondary Importance 41

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

In the Matter of Ticor Title Insurance Co., et al., FTC Docket No. 9190 *Initial Decision Issued By Administrative Law Judge Morton Needleman* (Complaint filed January 7, 1985) (Decision Filed December 22, 1986); reprinted *Competitive Practices In The Title Insurance Industry*, *Hearing Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary House of Representatives* (May 4, 1988), Ser. No. 132, Appendix 2 ....10, 20, 37

Watson v. Muirhead, 57 Pa. 161....................8

STATUTES

12 U.S.C. §§ 2601, *et seq.*....................1

12 U.S.C. § 2601(a)....................33

12 U.S.C. § 2604(b)(4)....................33

12 U.S.C. § 2607....................4

12 U.S.C. § 2607(d)(2)....................5, 35, 39

12 U.S.C. § 2608(a)....................33

12 U.S.C. § 2614....................35

12 U.S.C. § 2617(c)(1)....................41

ORC Ann. § 3935.04(D)....................36, 37

ORC Ann. § 3935.07....................37

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Dr. E. S. Savas, Assistant Secretary For Policy Development And Research, U.S. Department of Housing And Urban Development, *Testimony Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance And Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) 32

James L. Boren, Jr., President of ALTA, *Testimony and Written Statement: Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcommittee On Housing And Community Development Of The Committee On Banking, Finance And Urban Affairs, House of Representatives*, 97th Cong. 1st Session (September 15, 1981) 22, 38

Thomas P. Vartarian, General Counsel of the Federal Home Loan Bank Board, *Statement*; *Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee, On Banking, Finance And Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) 20

TABLE OF AUTHORITIES – Continued

Page

TREATISES

Nielsen, J. Bushnell, *Title & Escrow Claims Guide*, Second Edition, Woodridge Legal Publishers (2007) 26

GOVERNMENTAL REPORTS

Birnbaum, Birny, Report to the California Insurance Commissioner, "*An Analysis of Competition in the California Title Insurance and Escrow Industry*" (December 2005) 21

Department of Justice's Antitrust Division, *The Pricing and Marketing of Insurance* (January 1977) reprinted in part in *Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee On Banking, Finance, and Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) ....*passim*

Report of Department of Housing and Urban Development and Veterans Administration, Mortgage Settlement Costs (1972) reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, And Site Selection Policies: Hearings Before the Subcommittee On Housing of the Committee on Banking and Currency, House of Representatives*, 92d Congress, Second Session (February 22-24, 1972) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers, Report to the Ranking Member, Committee on Financial Services, House of Representatives, Government Accountability Office (April 13, 2007), *available at* http://www.gao.gov/new.items/d07401.pdf (last visited October 14, 2011) 39

OTHER MATERIALS

Al Harris, *Embezzlement investigation hits firm hard*, Richmond BizSense (September 19, 2011), *available at* http://www.richmondbizsense.com/2011/09/19/embezzlement-investigation-hits-firm-hard/ (last visited October 14, 2011) 28

Alexandra Clough, *Title Firm's Owner AWOL As Claims Rise To 10 Million*, Palm Beach Post (August 09, 2009), *available at* http://www.palmbeachpost.com/business/content/business/epaper/2009/08/09/a1b_cloughcol_0810.html (last visited on October 14, 2011) 29

Demotech, Inc., *Financial Stability Ratings Title Definitions* (2011), *available at* http://www.demotech.com/01_pages/services/fsr/fsr_title_definitions.aspx (last visited October 14, 2011)....27

LandAmerica Financial Group files bankruptcy – sells business Reuters (November 26, 2008), *available at* http://www.reuters.com/article/2008/11/26/us-landamerica-idUSTRE4AP1W420081126 (last visited October 14, 2011) 27

TABLE OF AUTHORITIES – Continued

Page

Matt Carter, *Fidelity, LandAmerica agree to merger,* inmannews (November 7, 2008), *available at* http://www.inman.com/news/2008/11/7/fidelity-landamerica-agree-merger (last visited October 14, 2011) 27

OAITA, *Settlement Preference Survey*, *available at* http://www.oaita.org/OAITA_SPS_Executive Summary.pdf (last visited on October 14, 2011) 30

Stewart Title, *Build Confidence, Escrow Security Bonds, Product Flyer* (2010), *available at* http://stewartbonds.com/download/881/pdf/SSIS-1022-26-10_ESB_Product_Flyer_lowres.pdf (last visited October 14, 2011) 28

The Title Report, *Defalcation trends: Why are some states losing more agents than others?* (June 13, 2005), *available at* http://www.thetitlereport.com/TTR/Articles/10003.aspx (last visited on October 14, 2011) 23

Timothy A. Thrush, *Insured Closings*, Hennepin Lawyer, Official Publication of the Hennepin County Bar Association (October 28, 2004) at 2 of 5, *available at* http://hennepin.timberlakepublishing.com/article.asp?article=863&paper=1&cat=147 (last visited October 14, 2011) 17

Title Resources, *A Brief History of Title Insurance* (2011), *available at* https://www.titleresources.com/History.aspx (last visited on October 14, 2011) 10

BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT LAND TITLE AGENTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Independent Land Title Agents ("NAILTA") is a national trade association consisting of state-licensed independent title insurance agents and state-licensed title insurance agencies, with associate membership extended to title insurance underwriters and title insurance industry stakeholders from across the United States.[2]

NAILTA's interest in this case is directed to ensuring the correct application of 12 U.S.C. §§ 2601, *et seq.,* in order to protect the consumer and promote competition in the title insurance industry. NAILTA believes that this brief will assist the Court in understanding the complexities of the title insurance process and determining whether standing should be

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution towards the preparation and submission of this brief. All parties have consented to this filing.

[2] "Title insurance agent" refers to a NAILTA member's authorization to write, or issue, title insurance policies that are underwritten by a title insurance company/underwriter. Some members write title policies principally through a single title insurance company/underwriter, while other members write policies through multiple insurance companies/underwriters.

afforded consumers who sustain injury when their right to select a settlement service provider has been systematically denied through prohibited kickback referral schemes. In addition, NAILTA's numerous Ohio members have a high degree of familiarity with the title insurance industry and the regulatory scheme of Ohio where Respondent closed her home loan.

NAILTA is a non-profit, member-supported national trade organization working to protect the transparency, credibility and sanctity of the land title process. NAILTA works to protect the independence of the title insurance industry from its referral sources and the Association advocates for competition in the industry and the removal of conflicts of interest from the real estate process for title insurance consumers (i.e., homeowners, buyers and borrowers). In furtherance of its mission, NAILTA also filed an *amicus curie* brief in support of Respondent in the Ninth Circuit Court of Appeals.

The issues presented by NAILTA are relevant to the current matter because the practices alleged in this case restrict competition, reduce the transparency of both the title insurance industry and the real estate process, and undermine the title insurance consumer's right of choice of title insurance providers.

NAILTA in support of Respondent believes that the private right of action conferred upon Respondent and those similarly situated by Congress, is a

continuing deterrent to illegal referral fee arrangements, such as that alleged in this case.

SUMMARY OF ARGUMENT

Respondent's complaint alleges that Petitioner, First American Financial Corporation, paid two million dollars to Tower City Title Agency, LLC (Tower City), a Cleveland-based title insurance agency, in order to secure an exclusive title insurance referral arrangement, as well as a small ownership interest in that Tower City. (Pet. App. 53a ¶ 20). Respondent's complaint also alleges that pursuant to the exclusive title insurance arrangement, Tower City arranged for Respondent's purchase of an owner's and lender's title insurance policy from Petitioner, First American Title Insurance Company, without Respondent's knowledge of or consent to the alleged kickback/referral arrangement. (Pet. App. 49a ¶¶ 3-5).

The question whether a consumer suffered an "injury" from a kickback or referral fee scheme prohibited by RESPA, cannot be answered by looking solely at whether or not there was an "overpayment" of the title insurance premium. Residential real estate title insurance covered by RESPA, as part of regulated "settlement services," involves far more than the sticker price of title insurance.

The real estate settlement services provided by a title insurance company/underwriter or its title insurance agent involve a bundle of title-related

services, including a title search, a title examination, a determination of insurability, a determination of exceptions to the title policy, issuance of a title policy and the issuance of "closing protection letters" to protect against defalcations. The ability, quality, and manner of the performance of these multiple services – all provided in the consumer's purchase of title insurance from a title insurance company/underwriter – are of equal or greater significance to the consumer than the charge for title insurance.

Each of these title-related services comes at a price and has an essential value to the title insurance consumer. The final product (the title insurance policy) delivered to the consumer can only be measured in terms of quality and completeness through the use of honest and independent judgment, untainted by illegal kickbacks and/or illegal referral fee schemes prohibited by Section 8 of RESPA. 12 U.S.C. § 2607. Only with an understanding of the complexities of the title insurance process can the injury suffered by a consumer, whose choice of settlement service providers is manipulated by a prohibited kickback and/or referral fee scheme, be determined.

In enacting Section 8, Congress understood the complexity and difficulty in quantifying the precise harm that illegal kickbacks and illegal referrals have on the bundle of title services being provided to the consumer by the title insurance company/underwriter and its agent. The imposition of statutory damages when a violation of Section 8(a) of RESPA occurs is indicative of Congress' understanding of the difficulty

any consumer would face in trying to quantify the specific pecuniary harm in circumstances where the result of the harm may not immediately be known. In fact, low quality or substandard title insurance services during the title insurance process may not be known until the consumer seeks either to sell or refinance the real property, many years after the service is performed.

It is in the context of the amalgam of settlement services being provided in the title insurance process that Respondent's standing to bring a private cause of action under Section 8 of RESPA, 12 U.S.C. § 2607(d)(2), must be determined, not merely by whether or not Respondent was overcharged for her owner's and lender's policies of title insurance as argued by Petitioners and their *amici*.

The harm to Respondent is not speculative or hypothetical or a general grievance. Respondent's injury is real and cognizable because her right to freely select the title insurance/underwriter of her choice from which to purchase title insurance related services was breached by a prohibited referral scheme.

STATEMENT

I. THE TITLE INSURANCE PROCESS

"The ownership of real property has long been one of the great bulwarks of the American free enterprise system." *Report of Department of Housing and*

Urban Development and Veterans Administration, Mortgage Settlement Costs (1972), at 5.[3] Possession, occupancy and use derived from title to real property are of paramount importance to the potential or actual land owner.

Title to real property is a bundle of legally protected rights, which include possession, control, enjoyment, and the power to transfer the property to another. It is in the exercise of the "power to transfer" that the issue of clear title or marketable title arises. In any transfer of an interest in real property, whether by sale or by mortgage, the purchaser or lender desires to know what pre-existing rights or interests of others might encumber or restrict the use of the real property being sold.

Encumbrances and other title defects that affect the title to real property may take numerous forms, including pre-existing liens, easements, use restrictions or claims arising from defects in prior transfers, such as failure of an heir or spouse to have transferred his or her rights in a prior transfer. Only by understanding the encumbrances and title defects that affect real property can a purchaser and/or mortgage lender decide whether marketable title exists

---

[3] Reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, And Site Selection Policies: Hearings Before the Subcommittee On Housing of the Committee on Banking and Currency, House of Representative*s, 92d Congress, Second Session (February 22-24, 1972), at 741.

and whether the property could be used for the purposes intended by the purchaser.

A. Real Property Title Assurance Prior to Title Insurance

Before 1876, the basic method of providing proof of a marketable title and disclosure of any restrictions on use of the real property involved searching the public records in the county of the *situs* of the real property. This public records search was performed by an "abstractor," who, after the search was completed, would deliver to a potential purchaser or lender an "abstract of title." An abstract of title was a chronological order of all related and relevant publicly recorded documents that affected the title to the real property at issue. This would include a chain of ownership or chain of title from the current owner to each of the prior owners, back to original acquisition of the real property via transfer by original patent from the sovereign. The abstract of title would also disclose any encumbrance that was either voluntarily or involuntarily placed against the real property by any of the owners shown in the chain of title.

The "abstract of title" did not evaluate the legal efficacy of any of the documents reported by the abstractor. If the buyer or lender desired to have the documents evaluated, the abstract of title would be turned over to an attorney who would issue an "Attorney's Opinion" or "Certificate of Title" regarding

the state of the title and any encumbrances and their effect on the title or use of the real property.

As to both the "abstract of title" and the "attorney's opinion," if either the abstractor or the attorney made a mistake, liability would arise from an action based on negligence. However, any negligence claims were limited by the applicable statute of limitations and/or the death of the abstractor or the attorney. A further limitation was the fact that since all of the work of the abstractor or the attorney was based upon the public record, any defects of title occurring "off-record" were not within their scope of cognizable negligence.

B. Emergence of Title Insurance

In 1868, the Pennsylvania Supreme Court decided the case of *Watson v. Muirhead,* 57 Pa. 161. The case held that Watson, an innocent purchaser of real property, had no recourse against Muirhead, a title abstractor, for clearing the title to the real property after relying on the advice of an attorney that certain judgments were invalid. As a result of the *Muirhead* decision, the Pennsylvania legislature enacted a statute that authorized the issuance of title insurance. On March 28, 1876, a group of conveyancers met in a small office opposite Philadelphia's Independence Hall to incorporate the world's first title insurance company, The Real Estate Title Insurance Company. This company was the first to issue guarantees of title with specific indemnity clauses. From this early

"Philadelphia System" arose modern title insurance, the only form of insurance invented in the United States.

In simplest terms, title insurance is a contract of indemnity between the title insurance company/ underwriter and the insured (the purchaser and/or lender) that is designed to protect purchasers or mortgage lenders from unforeseen loss due to title defects such as liens or encumbrances upon, defects in, or the unmarketability of, the title to real property for which the policy is issued. In addition, title insurance could protect purchasers and/or mortgage lenders from "off-record" risks not discoverable from an examination or evaluation of the publicly recorded documents, e.g., forgeries and fraudulent conveyances, etc.

These contracts of indemnity have evolved into two types of recognized title insurance policies: (i) policies issued to protect buyers of real estate (Owner's Policy of Title Insurance); and (ii) policies issued to lenders to protect the mortgagee's title, which secures the loan (Loan Policy of Title Insurance).

The fundamental difference between land title insurance and other types of casualty insurance (which include homeowners, automobile and commercial general liability insurance) has always been the commitment of the title insurance industry to seek "risk prevention" over "risk assumption." "Title insurance is closer to a risk avoidance service than to

risk indemnification." Department of Justice's Antitrust Division, *The Pricing and Marketing of Insurance* (January 1977), at 7 (hereafter "*1977 DOJ Study*").[4]

The casualty insurance approach of "risk assumption" assures financial indemnity through a pooling of risks for losses arising out of an unforeseen future event such as death or accident. The title insurance approach of "risk prevention" has as its goal the elimination of risks and the prevention of losses caused by defects in title arising out of events that occurred in the past.

Prior to World War II, the growth of the title insurance industry had been limited to local and regional title insurance underwriters. After World War II the enormous demand and expansion of home ownership produced an equally expanded secondary mortgage market.[5] From the growth of the secondary mortgage market arose the need for standardization of both title assurances and mortgages.[6] Title

---

[4] Reprinted in part in *Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee On Banking, Finance, and Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) (herein "*1981 Hearings*"), at 253.

[5] Title Resources*, A Brief History of Title Insurance* (2011), *available at* https://www.titleresources.com/History.aspx (last visited on October 14, 2011).

[6] *In the Matter of Ticor Title Insurance Co., et al.*, FTC Docket No. 9190 *Initial Decision Issued By Administrative Law Judge Morton Needleman* (Complaint filed January 7, 1985) (Decision

(Continued on following page)

insurance provided this standardization for titles to real property.

C. Modern Title Insurance Practices

The concepts and guarantees embodied in an abstract of title and an attorney's opinion still provide the fundamentals of how a title company/underwriter issues a policy of title insurance for a specific real estate purchase or mortgage loan. The process of producing an abstract of title is now more commonly called a "title search." Often, the title search is either performed by an in-house employee of the title insurance company/underwriter, by its title insurance agent or by an independent title-searching service.

Whether done in-house or by an outside title searching service, once the title search is completed it is submitted for examination by the title insurance company/underwriter, its title insurance agent, or both. Next, an examination of the title search is performed, which is not unlike the traditional attorney's evaluation of the abstract of title made in order to issue an attorney's opinion or certificate of title. A title examination consists of a critical analysis or interpretation of the condition of title as revealed by

---

Filed December 22, 1986) at 18 ¶ 37; reprinted *Competitive Practices In The Title Insurance Industry*, *Hearing Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary House of Representatives* (May 4, 1988), Ser. No. 132, Appendix 2, at 131.

the documents disclosed by the title search to determine the insurability of the title.

The importance of the title search, the title examination, and the determination of insurability, to all parties to a real estate transaction, cannot be overstated. The examination of the title search for encumbrances or title defects is the basic element of risk avoidance in determining the insurability of the title by the title insurance company/underwriter. It is also the basis upon which a mortgage lender determines if it will have marketable title to its mortgage and the basis upon which a purchaser is informed of any undesirable limitations on the use of the real property that have been imposed upon the real property by prior owners.

In modern title insurance practice, the results of the title search and the examination of title are manifested in "Schedule B" of the preliminary title report and contract for title insurance, more commonly known as "the binder," or "title commitment." Schedule B of the title commitment discloses to the purchaser and/or lender what, if any, encumbrances, restrictions on use, liens or other defects, often referred to as "show items," affect the title to the real property. In the context of title insurance, those encumbrances, and other items listed which have been determined to affect the title, are in fact a list of title defects or encumbrances that are "exceptions from coverage" by the insurance company/underwriter.

The risk of a claim based upon any of the title commitment Schedule B "show items" is avoided by listing exceptions to coverage of the items at this initial stage of the title insurance process. Unless removed or "cured" prior to closing of the transaction, the Schedule B "show items" to the commitment will be transferred to Schedule B of the final title insurance policy, and those exceptions will prevent specific indemnity for those items.

The title commitment Schedule B "show items" have other significant uses in a real estate transaction besides being the basis for risk avoidance by the title insurance underwriter. The title commitment's Schedule B "show items" provide the mortgage lender sufficient information to determine whether there exists a mortgage that will be a first and best lien acceptable in the secondary market, or whether the title has material defects that adversely affect the mortgage's priority and marketability. For example, if Schedule B shows a prior judgment lien that would have priority over the proposed mortgage lien of the lender, the lender can refuse to make the loan until the lien is satisfied and cancelled of record.

The title commitment Schedule B "show items" are also utilized by the purchaser and any attorney, surveyor, architect, and/or engineer employed to advise the purchaser regarding the feasibility of the planned use of the real property by the purchaser. For example, if a pipeline right of way appears as a "show item," it is then imperative for the purchaser to know where the pipeline right of way is located on the real

property and whether the pipeline right of way will prevent any future construction of a home, home addition or other structure within the right of way. Without this information, a purchaser could unfortunately find that a subsequent garage built over the pipeline right of way must be removed.

A review of Schedule B of the title commitment allows the purchaser and purchaser's advisors to make an informed decision as to whether to insist that an encumbrance or title defect be removed by the seller, if the purchase agreement provides for such remedy. If removed, the encumbrance or title defect is no longer excluded from title insurance coverage and is no longer an impediment to the purchaser's use. In the alternative, or if the seller cannot remove the encumbrance or title defect, the purchaser may refuse to proceed with the purchase due to the adverse effect a disclosed encumbrance or title defect imposes on the purchaser's planned use of the property.

From this description of Schedule B "show items," the importance of the quality of the title search and subsequent title examination is readily apparent. However, not all title companies/underwriters employ or mandate the same standards either in performing a title search or a title examination, or accepting the results of such a title search or title examination.

For example, Ohio law requires only that every policy of title insurance must be based upon a "reasonable examination of title" and "a determination of insurability." Ohio has no mandated standards except

a general requirement that examination of title and determination of insurability should be left to the "sound underwriting practices" of title insurance companies/underwriters. ORC Ann. § 3953.07.

Further, Ohio has no statutory requirement that the title search, the examination of title, and/or the determination of insurability be performed by an attorney or licensed title insurance agent or other licensed person. In fact, in Ohio the title search, the title examination and the determination of insurability may be performed by an attorney, licensed title agent or some other unlicensed person whom the title insurance company/underwriter or title insurance agent decides has sufficient relevant knowledge and ability.

Such minimal and unspecific standards have produced within the title industry a wide variation in the skill and knowledge of the individuals performing title searches, title examinations and determination of insurability. In the experience of NAILTA members, these variations produce corresponding effects on the quality of title searches, title examinations, and/or determination of insurability.

Another significant variable in the title insurance process is in the manner of the "closing" of the real estate transaction. There are two recognized types of real estate closings: the "round table closing" and the "escrow closing."

A round table closing consists of all interested parties meeting face-to-face to simultaneously exchange

funds and instruments of conveyance. An escrow closing, by contrast, does not entail an actual closing or meeting of all parties to exchange funds and instruments of conveyance. The closing is handled by a neutral third party.

The third party, an "escrow agent," secures a separate "sign-up" of the seller and/or purchaser/borrower for any necessary documents. Once the escrow agent secures execution of all the necessary documents and has receipt of all funds necessary to close the transaction, the instruments of conveyance are recorded with the appropriate local governmental office and the funds placed into escrow are disbursed. In certain areas of the country, including northeastern Ohio, title insurance agents act as escrow agents to handle the closing for a real estate purchase or mortgage refinance.

Even in a round table closing, a "settlement agent," employed by the title insurance company/underwriter or the title insurance agent is necessary to handle all the major aspects of bringing the transaction to "closing." This may include receiving, handling and disbursing funds received from the mortgage lender.

Policies of title insurance do not insure closing services or matters of escrow. In a majority of jurisdictions, the title insurance company/underwriter is insulated from liability of independent closing agents

not employed directly by the title insurance company/ underwriter.[7]

Because title insurance agents may act as settlement agent or escrow agents, who handle settlement funds and documents, the title insurance industry has seen the emergence of separate title insurance coverage by title insurance companies/ underwriters for the handling of the funds and documents placed into escrow for a real estate transaction.

Closing or settlement protection coverage is issued by the title insurance company/underwriter providing a "closing protection letter" to the seller, purchaser or lender involved in a real estate transaction that requires title insurance. The "closing protection letter" makes the title insurance company/ underwriter responsible for lost funds or documents due to a defalcation of the title insurance company/ underwriter's agent.[8]

---

[7] Timothy A. Thrush, *Insured Closings*, Hennepin Lawyer, Official Publication of the Hennepin County Bar Association (October 28, 2004) at 2 of 5, *available at* http://hennepin.timberlakepublishing.com/article.asp?article=863&paper=1&cat=147 (last visited on October 14, 2011).

[8] "Defalcation" in the title industry refers to the misappropriation or misuse of escrow funds intended to be used to close insured transactions by a settlement agent or title insurance/ escrow agent.

D. Marketing Of Title Insurance Through Reverse Competition

Since title insurance is ancillary to the purchase of real property, the financing of the purchase, or the re-financing of an existing mortgage loan, the marketing of title insurance differs from other forms of insurance. Marketing of title insurance often occurs through the process of "reverse competition."

> In other words, competition in the title insurance business is directed at the producer of the business rather than the consumer. A title company wishing to increase its market share would not necessarily try to reduce prices or improve coverage in order to attract retail purchasers of title insurance. Rather, the company would seek to influence those brokers, bankers and attorneys who are in a position to direct the title insurance business to it. The most direct manner of influencing this is to grant the producer of the business a fee, commission, rebate, or kickback – to the detriment of the title insurance purchaser. This is the phenomenon of reverse competition.[9]

In a real estate transaction, due to the complexities of the title insurance process, the purchaser/borrower is often amenable to being referred by someone who the purchaser/borrower believed to be acting in his or her best interest, such as a title

---

[9] *1977 DOJ Study*, at 256.

insurance agent, a real estate broker/agent, a loan officer or a builder. However, the consumer is generally unaware of whether the referral is based on the payment of a kickback or referral fee, rather than on the merits and in the consumer's best interests.

> The presence of reverse competition in the title insurance industry has resulted in "a long history of such anti-competitive practices as fixed fees, forced (tied) sales and kickbacks." Reverse competition (h)as the effect of raising the cost of title insurance, for the higher the cost of the insurance, the larger the referral commission or kickback to the business producer and the more business a title insurer is likely to have. There is little incentive to increase efficiency of title search or expand coverage.[10]

E. The Formation Of Affiliated Business Arrangements And Controlled Business Arrangements To Market Title Insurance

After the passage of RESPA in 1974, in order to circumvent Section 8's prohibitions against illegal kickbacks and unearned fees for referrals and in order to continue the pre-RESPA common practice of the payment of referral compensation, referral sources began acquiring an ownership interest in a

---

[10] *1977 DOJ Study*, at 256-257.

title insurance agent's business.[11] This practice became known as "affiliated business arrangements" or "controlled business arrangements."

These business arrangements continued the title insurance company/underwriter's and title insurance agent's approach to marketing title insurance services by "reverse competition."[12] By providing an ownership interest in the title insurance company/underwriter's or title insurance agent's business, referral sources could ostensibly be compensated by dividends or other profit sharing arrangements. As a result, these "controlled" or "affiliated" business arrangements perpetuate the pre-RESPA practice of the title insurance company/underwriter or title insurance agent being able to compensate its referral sources.

F. Buying of Market Share By Title Insurance Companies/Underwriters

The growth of title insurance companies/underwriters is "largely tied" to their ability to solicit and retain agents "who can influence the placement of business."[13] This model for title insurance marketing by title insurance companies/underwriters has led

---

[11] See: Thomas P. Vartarian, General Counsel of the Federal Home Loan Bank Board (*1981 Hearings*), at 51.

[12] *1977 DOJ Study*, at 274.

[13] *Supra* at n.6, *In the Matter of Ticor Title Insurance Co.* at 20 ¶ 44.

to a significant consolidation, both vertical and horizontal, in the national title insurance industries, referred to as "buying market share."[14]

Title insurance companies/underwriters, like Petitioners here, utilize "Captive Title Insurance Agreements" (hereafter "CTIA" or "CTIAs") to buy market share in the title insurance industry within a specific market area. A CTIA occurs when a title insurance company/underwriter purchases a financial interest in a previously independent title insurance agent, who may already represent multiple title insurance companies/underwriters, and who has a significant share of a particular localized title insurance market. As part of the purchase transaction, the title insurance agent agrees to refer all or substantially all of the agent's title insurance business to the purchasing title insurance company/underwriter.

CTIAs can be differentiated from an "exclusive agent relationship" established between a title insurance company/underwriter and a title insurance agent. The distinguishing factor between a CTIA and an exclusive agent relationship is the current practice of title insurance companies/underwriters paying money to title insurance agencies (two million dollars in this case) in order to secure the title insurance

---

[14] Birnbaum, Birny, Report to the California Insurance Commissioner, "*An Analysis of Competition in the California Title Insurance and Escrow Industry*" (December 2005), Section 5.2.2.2, at 59.

referrals and to buy market share.[15] Even though this type of business arrangement may be (according to Petitioners' *amicus* the American Land Title Association, herein "ALTA") "decades old, widespread and exceedingly popular,"[16] the payment for the exclusive referral arrangement is expressly prohibited by Section 8(a) of RESPA.[17]

II. VARIATION IN TITLE INSURANCE COMPANIES/UNDERWRITERS

Because title insurance is a complex process, differences between and among title companies/underwriters can have a significant effect on the title insurance services delivered to consumers. Thus, a title insurance consumer's selection of a title insurance company/underwriter can benefit the consumer – or injure him or her if the selection is not made freely and properly.

---

[15] See: *Affidavit of James Stipanovich*, Joint Appendix, at 128-129.

[16] ALTA Br. at 7.

[17] ALTA, which supported RESPA's enactment in 1974 and an outright prohibition on "controlled" or "affiliated" business arrangements in 1983, now seeks to defang RESPA altogether. See: James L. Boren, Jr., President of ALTA (*1981 Hearings*) at 168. The reason for ALTA's about-face is that its members (such as Petitioners) have adopted the same tactics they once criticized and are now paying kickback and referral fees for market share, as with Tower City.

These disparities in quality and service are so well known in the industry that they have been acknowledged by the prior owner of Tower City, the recipient of Petitioners' $2 million referral fee. In a 2005 symposium, Marilyn Mannarino (then Tower City's President) tied the risk of title agent defalcation to the rise of ABAs and CBAs and the role of title insurance companies/underwriters. "When the title company ceases to be the disinterested third party, bad decisions can be made – sometimes on purpose and sometimes because they are looking through rose-colored glasses."[18]

And yet these variations among underwriters are virtually impossible for consumers to discern when buying a home, while the harms to consumers may be undetectable (except at great cost), or unknown for many years after the purchase transaction, as we now show.

A. Differences in Performance of Basic Services

Variations in the title insurance company/ underwriter's practices and standards translate directly to the quantity and quality of the information provided in the title search, the reliability of the title

---

[18] The Title Report, *Defalcation trends: Why are some states losing more agents than others?* (June 13, 2005), *available at* http://www.thetitlereport.com/TTR/Articles/10003.aspx (last visited on October 14, 2011).

examination, and ultimately the determination of insurability. Unfortunately, in recent years the practices and standards for a land title search demanded by some title insurance companies/underwriters have been relaxed. The title search period for a chain of title has been reduced from the customary periods of clearing restrictions and uses by operation of state marketable title acts, to searches restricted by the time period of the current owner's coming into title.

A "current owner" search of the title records omits liens and other encumbrances that would have attached to the interest held by prior owners in title. This is in contrast to many of NAILTA member regional title insurance companies/underwriters' requirements for the customary "full title search" of thirty, forty-two or sixty-plus years beginning from the deed or "root" of the current owner's title.

The lesser standard of "current owner search" is primarily utilized as a cost saving measure by the title insurance company/underwriter and its agents. However, there is no evidence that such cost savings have been reflected in any corresponding reduction in charges to the consumer for such lesser title search.

Further, the current owner search provides the consumer a lesser quality title search. It provides no record of "use" restrictions or other encumbrances prior to the current owner's acquiring title. This directly affects the real property purchaser's ability to have a complete picture of the title, including any existing easements and other restrictions that might

affect use of the property. Only through a "full title search," and a detailed listing of encumbrances, easements and restrictions in Schedule B of the title commitment, can a purchaser know the status of the title to the real property prior to closing the transaction and the issuance of the title insurance policy.

B. Differences in Claim Handling

The selection of the means of handling claims against the insured's title, as set forth in a policy of title insurance, is another discriminating factor that separates title insurance companies/underwriters. Under a standard policy of title insurance, the title insurance company/underwriter has six expressed means to handle a claim. The title insurance company/underwriter may:

> "1. Pay the insured his or her actual loss * * * ;
>
> 2. Defend an insured who has been sued * * * ;
>
> 3. Prosecute an action on behalf of the insured to establish or clear title * * * ;
>
> 4. Pay the insured policy limits * * * ;
>
> 5. Pay the party adverse to the insured * * * ; and,
>
> 6. Cure the insured's title by obtaining a deed, easement, release or other instrument * * * .

> The insurer never has all six options in a particular claim, but when there is more than one option, the insurer has the right to choose which one it will exercise. In some instances, insurers also have a seventh option not directly described in the policy, which has been termed 'watchful waiting' or 'meaningful monitoring.' This option is the appropriate response when a potential for loss exists, but the coverage in the policy calls for the insurer to act only on the occurrence of some future event."[19]

A title insurance company/underwriter's propensity to deny, settle or litigate claims is another significant factor in the quality of title insurance coverage offered by the title insurance company/underwriter. If a title insurance company/underwriter litigates all claims under the title insurance policy as a matter of course, the consumer can face years of litigation while the consumer's ability to sell or to re-finance is delayed until the claim is fully litigated, including any appeals.

C. Differences in Financial Stability

To a title insurance consumer, the financial strength of a title insurance company/underwriter may be of paramount concern if the real property being insured has significant value.

---

[19] Nielsen, J. Bushnell, *Title & Escrow Claims Guide*, Second Edition, Woodridge Legal Publishers (2007).

Annual insurance premiums generated or profitability cannot determine a title insurance company/underwriter's "financial stability rating." It is the title insurance company/underwriter's "balance sheet strength and financial integrity" that are "the ultimate determinants of the long term financial stability required to honor meritorious claims."[20]

This became evident on November 26, 2008, when LandAmerica Financial Group, Inc., which held ownership interests in six subsidiary title insurance underwriters, filed for bankruptcy protection. At the time of its bankruptcy filing, LandAmerica Financial Group, Inc. was the third largest title insurance company/underwriter in the United States. LandAmerica Financial Group, Inc. and four other title insurance companies/underwriters controlled 93% of the $14 billion U. S. title insurance market in 2007.[21]

---

[20] See: Demotech, Inc., *Financial Stability Ratings Title Definitions* (2011), *available at* http://www.demotech.com/01_pages/services/fsr/fsr_title_definitions.aspx (visited on October 14, 2011).

[21] See: Matt Carter, *Fidelity, LandAmerica agree to merger,* inmannews (November 7, 2008), *available at* http://www.inman.com/news/2008/11/7/fidelity-landamerica-agree-merger (last visited on October 14, 2011).

Also see: *LandAmerica Financial Group files bankruptcy – sells business*, Reuters (November 26, 2008), *available at* http://www.reuters.com/article/2008/11/26/us-landamerica-idUSTRE4AP1W420081126 (last visited on October 14, 2011).

D. Differences in Defalcation Prevention

Another critical element in the title insurance process has become issuance of "closing protection letters" that indemnify against a settlement agent or escrow agent absconding with a seller's, lender's or buyer's funds placed into escrow. Defalcations by title insurance settlement agents or title insurance/escrow agents are an increasingly severe problem for the title insurance industry and consumers.

Defalcations can adversely affect a title insurance company/underwriter's financial ability to continue to underwrite insurance. In September, 2011, Southern Title Insurance Company, a 90-year-old Virginia title insurance company/underwriter, ceased issuing title polices due to a significant defalcation by one of its Texas agents.[22] The title insurance industry had over 100 million dollars in defalcation losses in 2009 alone.[23]

Procedures for controls on and audits of title insurance agents or settlement agents handling escrow closings and escrow funds vary among title insurance companies/underwriters. The lack of such procedures

---

[22] Al Harris, *Embezzlement investigation hits firm hard*, Richmond BizSense (September 19, 2011), *available at* http://www.richmondbizsense.com/2011/09/19/embezzlement-investigation-hits-firm-hard/ (last visited on October 14, 2011).

[23] Stewart Title, *Build Confidence, Escrow Security Bonds, Product Flyer* (2010), *available at* http://stewartbonds.com/download/881/pdf/SSIS-1022-26-10_ESB_Product_Flyer_lowres.pdf (last visited on October 14, 2011).

can lead to significant defalcations by title insurance agents.[24]

ARGUMENT

Title insurance is not a commodity in which price is the only difference between the products offered by various suppliers. To the contrary, there is a great deal of variation among title insurance companies/underwriters and in the way they operate. As we have explained, these differences include:

- the quality and care of the underlying title search performed;
- the method for handling any claims that are made against the insured's title;
- the financial stability of the title insurance company/underwriter; and
- the procedures in place for preventing defalcation by settlement or escrow agents.

These differences matter for consumers. Because of the way that the title insurance industry operates, such differences often will be invisible to consumers,

[24] See: *supra* n.18, The Title Report. Also see: Alexandra Clough, *Title Firm's Owner AWOL As Claims Rise To 10 Million*, Palm Beach Post (August 09, 2009), *available at* http://www.palmbeachpost.com/business/content/business/epaper/2009/08/09/a1b_cloughcol_0810.html (last visited on October 14, 2011).

who must by necessity rely on the advice of real estate professionals in securing title insurance. Yet consumers are unable to identify these variations in advance, when buying title insurance. And the injuries that result from disparities in service and quality can be latent and undetectable, except at prohibitive cost.

As a result, consumers are directly harmed when those real estate professionals render such advice under the influence of referral-based conflicts of interest. Congress enacted RESPA precisely so that choices among settlement service providers would be made on the merits, and it imposed statutory damages because these identifiable injuries would be so hard to detect and prove.

I. REVERSE COMPETITION HARMS CONSUMERS AND INDEPENDENT TITLE AGENTS

In 2009 and 2010, the Ohio Association of Independent Title Agents (OAITA) conducted a statewide survey of the real estate settlement service preferences of Ohio real estate consumers.[25] OAITA's "Settlement Preference Survey" polled real estate consumers about issues related to controlled business arrangements, referral schemes and conflicts of

[25] OAITA, *Settlement Preference Survey*, *available at* http://www.oaita.org/OAITA_SPS_ExecutiveSummary.pdf (last visited on October 14, 2011).

interest in the real estate and title insurance industries.

The results suggest that a majority of Ohio consumers involved in a real estate transaction: (i) rely on referrals to select a title insurance company/ underwriter; (ii) believe that it is "important" or "very important" that their title insurance agent be a "neutral third party in determining what affects their title;" and (iii) believe that it is a "conflict of interest" for a referral source to receive a profit from making a title insurance referral. By a margin of four to one (38% to 9%), consumers report that they are "less comfortable" when they learn to their surprise that their referral resulted from a "controlled business arrangement."[26] The OAITA study went on to conclude:

> "Title insurance agents lack meaningful access to Ohio real estate consumers concerning the merits and differences of their services. These inequities are enhanced by the referral sources and their advocates who promote CBAs and market consolidation as a further means to separate consumers from title insurance agents."[27]

Reverse competition in its present form of controlled business arrangements and CTIAs continues the negative impact on purchasers of title insurance found by

---

[26] *Id.*

[27] *Id.*

the *1977 DOJ Study*. When the referral source is able to direct the purchaser of title insurance to a particular title insurance company/underwriter or a particular title insurance agent that the referral source has an interest in or is receiving a referral fee from, the purchaser/consumer is likely to end up "paying unreasonably high premiums," "accepting unusually poor service," or "accepting faulty title examinations and policies" from the controlled business.[28]

II. CONGRESS RECOGNIZED THE IMPORTANCE OF A CONSUMER'S LEGAL RIGHT TO SELECTION OF SETTLEMENT SERVICE PROVIDERS

Congress in passing RESPA recognized that the consumer was best served if he or she was protected from certain injurious practices that impaired the consumer's ability to receive the best choice of any settlement service providers. As set forth above, the selection of a title insurance company/underwriter is often a critical decision and affects the consumer's ability to receive "clear" or "marketable" title to real property. A consumer's ability to select service providers was a basic assumption behind the enactment of RESPA.[29]

---

[28] *1977 DOJ Study*, page 273.

[29] See: Dr. E. S. Savas, HUD Assistant Secretary For Policy Development And Research (*1981 Hearings*), at 5.

This basic assumption is affirmed in RESPA's statement of intent to insure that consumers are provided with "timely information on the nature and costs of the settlement process." 12 U.S.C. § 2601(a). It is axiomatic that the reason to inform a consumer of the "nature and costs of settlement services" is to enhance a consumer's right to make informed decisions as to which settlement service provider to select.

Congressional emphasis on informing the consumer of "choice" in selection of settlement service providers is further evidenced by RESPA's mandate that the Secretary of Housing and Urban Development prepare and distribute "special information booklets" which "*include in clear and concise language*" "an explanation of *the choices available* to buyers of residential real estate *in selecting persons to provide necessary services* incident to a real estate settlement." 12 U.S.C. § 2604(b)(4) (Emphasis added).

Recognition of a consumer's right to freely make a selection of any settlement service provider is also found in Section 9 of RESPA's prohibition against sellers, who as a condition of sale require directly or indirectly "that title insurance covering the property be purchased by the buyer from any particular title company." 12 U.S.C. § 2608(a).

III. THE INJURIES DUE TO SUBSTANDARD TITLE INSURANCE SETTLEMENT SERVICES ARE LATENT AND HARD TO DETECT

Congress's decision to award statutory damages under RESPA, rather than to require detailed proof of specific pecuniary harm, is particularly sound because of the nature of the injuries caused by defective title insurance services. Such injuries are typically latent and hard to detect.

A consumer's injury based upon a substandard or poor quality title search and/or title examination, due to a violation of Section 8(a) of RESPA, may not emerge or be discovered for years after the closing and title transfer of the real property and the issuance of the final policy of title insurance. To find the defect the consumer would need a second "accurate" title search and title examination to be performed.

Normally, a consumer will not have another title search and title examination performed on the consumer's real property until another triggering event necessitating another title search, title examination and the issuance of title insurance. For example, if a consumer must remove a garage because it is built over a pipeline right-of-way, that problem could be hidden until the property is offered for sale. Likewise, a consumer will be unaware of problems in claims handling until a claim is actually asserted potentially decades later.

The triggering event often occurs when the consumer sells the property or re-finances his or her mortgage. It is only then that the new title search and title examination will uncover title defects or negative use restrictions undisclosed by the substandard or poor quality title search and title examination resulting from a Section 8 prohibited referral fee scheme. When the new title search and title examination discloses the defect the consumer will experience the impact of the original injury of the substandard or poor quality title search and title examination. Unfortunately, if the "curing" or "removal" of the undisclosed defect delays the consumer's transaction, the consumer bears the risk of the loss of a potential purchaser or the consumer, if refinancing, looses his or her mortgage loan "lock-in" rate.

A consumer's right to bring suit in federal court for an injury occasioned by the illegal kickback referral scheme is limited to one year. 12 U.S.C. § 2614. Without recognizing that Article III "standing" exists under RESPA for abridgement of a consumer's right to choose a service provider free of an illegal kickback referral scheme, there is little or no chance that the consumer would be able to bring a private action pursuant to 12 U.S.C. § 2607(d)(2), if the illegal kickback referral scheme later results in a substandard or poor quality title search and title examination that fails to disclose defects or adverse title restrictions on use.

Refusing to allow statutory damages would ignore the injury to the consumer that such schemes not only have on increased costs for title insurance, but on the latent injury that substandard or poor quality title search and title examination inflicts on the consumer.

IV. OHIO DOES NOT FIX OR ESTABLISH TITLE INSURANCE RATES

Petitioners argue that consumers including Respondent cannot establish standing under Article III of the Constitution unless they allege an overcharge for the purchase of the title insurance policy or policies issued. (Petitioners Br. p. 26). The basis of Petitioners' argument is the fact that at the time of Respondent's real estate transaction all Ohio licensed title insurance companies/underwriters were members of the Ohio Title Insurance Rating Bureau, which filed rates for all its members that were approved by the Ohio Superintendent of Insurance. (Petitioners Br. p. 5). ORC Ann. § 3935.04(D).

Therefore, Petitioners claim, because all premium rates for title insurance at the time of Respondent's real estate purchase were identical, there could be no overcharge. However, this argument ignores Ohio insurance law, procedures and practice.

Nothing in the Ohio insurance rate statutes would prevent Petitioners or any other title insurance company/underwriter from filing a ***lower*** rate than the rate filed by the rating bureau with the

Superintendent of Insurance, or seeking deviation from prevailing rates. See: ORC Ann. § 3935.04(D), ORC Ann. § 3935.07. And lower rates or deviations are likely to be approved. Even though the Superintendent of Insurance has the authority to disapprove filed rates, there are no instances of the Superintendent doing so.[30]

But Petitioners' reasoning is incorrect for a second, separate reason. Ohio does not regulate title search or title examination, or other related title insurance charges, which comprise a significant part of the cost to consumers.[31]

Ohio's title insurance rates approved by the superintendent of insurance reflect only a "risk rate."[32] A "risk" based rate applies only to risk assumption or underwriting expense but does not include costs involved in the title search or the title examination. Therefore, the title insurance premium charged a consumer in Ohio does not include the costs of the title search, title examination or other settlement services. As a result, at the time of Respondent's real estate purchase, all non-insurance premium charges

---

[30] *Supra* at n.6, *In the Matter of Ticor Title Insurance Co., et al.,* at 64, ¶ 158 and n.246. An October 4, 2011 check with the Ohio Department of Insurance revealed there had been no disapproval of any rate filings in the period of 1994 to 2011.

[31] Joint Appendix, at 41: *Ohio Title Insurance Rating Bureau, Inc., Schedule of Rates for Title Insurance in the State of Ohio* (effec. January 15, 2006).

[32] *Id.* at 43, ¶ 110, 65 ¶ 159; Joint Appendix, at 41.

for settlement services including the title search, title examination and other settlement services could be changed or varied without any rate being filed by the Ohio Title Insurance Rating Bureau or approved by the Superintendent of Insurance.

V. GOVERNMENTAL ENFORCEMENT EFFORTS CANNOT TAKE THE PLACE OF CONSUMERS ENFORCING THEIR OWN RIGHTS UNDER RESPA

Although RESPA provides certain remedies to state and federal regulators, Congress understood that private enforcement would also be required to ensure compliance with RESPA's anti-kickback provisions. This obvious truth has been recognized by the industry itself. As one of Petitioners' *amici* explained in 1981, federal regulation:

> "coupled with some well thought-out methods of enforcement, primarily private action[s] by consumers . . . would be a very good melding of Federal, State and private effort to cure a problem [the ill effects of kickbacks and referral fees] which is bothering us all."[33]

Accordingly, in crafting RESPA, Congress provided both the means and the incentive for private litigants to assure compliance with its mandates. See

---

[33] *Supra* n.17, James L. Boren, Jr., President of ALTA, *Testimony and Written Statement*, at 387.

12 U.S.C. § 2607(d)(2). Without the help of civil litigants enforcing their own rights, Congress's purpose for passing RESPA will be frustrated.

A. State RESPA Enforcement Lacks Deterrence

State regulators charged with RESPA enforcement are handicapped by limited resources and are therefore inadequate for protecting consumers. Title insurance is a relatively small line of insurance. State regulators scrutinize market conduct only minimally, which results in title insurance issues receiving minimal governmental oversight. *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, Report to the Ranking Member, Committee on Financial Services, House of Representatives, Government Accountability Office (April 13, 2007) at 47, "GAO Report."[34]

Additional funding alone will not cure this problem. A real estate transaction involves many different professionals: lawyers, bankers, builders, title agents, insurance agents and real estate brokers, each governed by different state regulators. *Id.* at 47. Thus, state regulators charged with policing the title insurance industry often lack the authority to pursue enforcement against many of the professionals identified

[34] *Available at* http://www.gao.gov/new.items/d07401.pdf (last visited October 14, 2011).

as the wrongdoers in a transaction. *Id.* And the state agencies that do regulate the non-insurance professionals have shown little interest in or knowledge of potential violations by their licensees. *Id.* at 48-49.

Moreover, the regulations governing these other professionals often substantially differ from those governing title insurers and agents, with each treating referral fees in a different way. *Id.* at 49. This further complicates enforcement efforts and makes cooperation and coordination between departments difficult. *Id.* at 47. For example, two state regulators responding to the most recent government survey of enforcement, confessed ignorance of the fact that referral fees were illegal under their state laws or under RESPA. *Id.* Thus, it is easy to see why at least one group of industry participants admitted they were not concerned about being caught engaging in illegal activity, because regulators had taken so little action in the past. *Id.*

Finally, state regulators lack the information, manpower and ability to police title insurance *rates*, apart from market behavior. According to the GAO, "few regulators review the costs that title agents incur to determine whether they are in line with the prices charged." *Id.* at 42. In addition, "only two of the six regulators [the GAO] . . . reviewed collected financial and operational data on title agents, and the regulatory officials both said that the data that they currently collect was insufficient to analyze the appropriateness of current premium rates." *Id.* at 42-43.

B. Federal Enforcement is Difficult, Prohibitively Complex, and of Secondary Importance

Congress vested the U.S. Department of Housing and Urban Development ("HUD") with authority to enforce RESPA at the federal level, 12 U.S.C. § 2617(c)(1), but only via injunctions.

Not surprisingly, federal authorities are at least as hamstrung as their state counterparts. HUD officials have also reported difficulties with their deterrence efforts because the small monetary settlements they obtain are considered to be a mere cost of doing business. *GAO Report* at 49. Between 2003 and 2006, settlements from HUD investigations resulted in approximately $302,000 in payments, while during the same period the combined net earnings of the five major national title insurers averaged about $1.6 billion each year. *Id*.

While RESPA does provide criminal sanctions for violations of Section 8 (a fine of up to $10,000 or up to 1 year in prison), such sanctions are rarely used, in part because they require prosecutions to be conducted by the Department of Justice. *GAO Report* at 41 n.29. Such insignificant penalties do not serve as an adequate deterrent to RESPA violations.

Moreover, HUD's enforcement mechanisms are complaint-driven. HUD relies on consumers not only to know when RESPA's mandates are being violated, but also to report such violations to authorities. *GAO Report* at 50. But most consumers are so overwhelmed

by their transaction that they cannot be expected to recognize when professionals they trust are violating the law. For these reasons, it is quite likely that many, if not most, RESPA violations are unreported. *Id*.

CONCLUSION

For these reasons, and those stated by Respondent, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GREGORY W. HAPP
Counsel of Record
238 West Liberty Street
Medina, Ohio 44256
(330) 723-7000
gregoryhapp@msn.com

Counsel for Amicus Curiae
National Association of
Independent Land Title Agents

October 2011